2643

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff in Error.

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation
Defendant in Error.

PETITION FOR REHEARING

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TO THE HONORABLE,
THE JUDGES OF THE CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT:

SOUTHERN PACIFIC COMPANY, plaintiff in error, pursuant to Rule 29 of this Court, respectfully petitions that a rehearing be granted of the decision rendered by this Court affirming the judgment rendered by the United States District Court for the Northern District of California.

The grounds upon which said rehearing is asked are as follows:

That the Railroad Commission of the State of California, which has been constituted a Court of last resort by the Constitution of the State of California, has rendered decisions which are final and from which there is no appeal, deciding that the Southern Pacific Company filed with the Railroad Commission of the State of California applications sufficient in form and substance, for relief from the provisions of the Long and Short Haul Clause of the Constitution, as amended October 10, 1911; and that the Railroad Commission of the State of California has, after investigation, entered an order relieving the plaintiff in error from the provisions of said Long and Short Haul Clause.

That these decisions of the Commission, interpreting the Constitution and determining the question whether Southern Pacific Company has been relieved from the operation of the Long and Short Haul Clause of the Constitution, are binding upon this Court and the trial Court, and that this Court should therefore have adopted the interpretation placed upon the Constitution by the Commission and accepted its findings of fact, decisions and orders as conclusive of the questions involved, and should have rendered its decision in accordance therewith and reversed the judgment herein.

The Railroad Commission of the State of California has rendered decisions which are final and

from which there is no appeal, deciding that no reparation can be recovered under the provisions of the Long and Short Haul Clause of the Constitution of 1879, on shipments moving prior to the Constitutional amendment of October 10, 1911, where rates have been established by said Commission; and that as it appears from the record that the rates involved in the controversy, applying on traffic which moved prior to October 10, 1911, were established and approved by the Commission, this Court should have accepted the Commisson's interpretation of the constitution and reversed said judgment.

That the decision of this court challenges and practically overrules the construction uniformly given to the California constitution for more than thirty-five years by the bench and bar, carriers and shippers alike.

That the decision of this court disregards the decisions of the California Railroad Commission, which as a "court of last resort" has uniformly held that, while charging rates to intermediate points higher than to more distant points is apparently in violation of the constitutional prohibition (Sec. 21, Article XII, Constitution 1879), the carriers were nevertheless justified and in fact required to charge rates "established and published" by the Railroad Commission in conformity with the "duty" imposed upon the Commission by the Constitution itself to "establish and publish" such rates, which in all

"controversies," civil or criminal, were declared by the Constitution to be "conclusively just and reasonable." (Sec. 22, Article XII, Constitution 1879);

That the decision of this court disregards the decisions holding that the rates established by the Commission pursuant to the "duty" imposed upon it by the Constitution of 1879, and the rates established under the Wright Act and the Eshleman Act and which were continued in effect by the constitutional amendment, are conclusively just and reasonable;

That the decision of this court declares to be erroneous and unlawful a construction of the constitution and statutes which has never heretofore been questioned or challenged, and requires the carriers to repay to shippers many thousands of dollars in violation of rates which the constitution declared shall be "conclusively just and reasonable," and which have been "established and published" by the Commission, and which have been uniformly observed;

That the decision of the court ignores the fundamental and controlling principle established by the decisions of the Federal courts, that this court is bound by the construction placed upon the constitution and statutes of California by the court of last resort, which here is the Railroad Commission of the State of California.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA HAS BEEN CONSTITUTED A COURT OF LAST RESORT, AND ITS DECISIONS IN CASES SUCH AS THIS ARE FINAL AND NOT REVIEWABLE.

The Supreme Court of the State of California has held that it has been established "beyond doubt that the Railroad Commission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising *judicial* functions of great moment. * * * * "

Pacific Tel. etc. Co. vs. Eshleman, 166 Cal., 640, 650.

It was further held, by the adoption of the amendment to Section 22 of Article XII of the California Constitution, "that there is the fullest possible grant of authority (to the Legislature) to confer all kinds of additional powers, with the sole limitation that whatever additional powers may be vested by the Legislature in the Commission shall not be inconsistent with the constitutional powers conferred; that this means and can only mean that the Legislature may not curtail any of the powers vested by the Constitution in the Railroad Commission, but that the legislative authority to confer any kind of additional powers is, and is expressly declared to be, 'plenary and unlimited by any provision of this constitution'; further, that the people, in enacting these constitutional amendments designedly and deliberately did this thing, to the end that the Railroad Commission thus constituted should have its

labors unvexed and their results untrammeled by the Courts of this State."

Idem, pp. 654-5.

The Court further said:

> "In view of these considerations we regard the conclusion as irresistible that the constitution of this State has in unmistakable language created a Commission having control of the public utilities of the state, and has authorized the legislature to confer upon that Commission such powers as it may see fit, even to the destruction of the safeguards, privileges and immunities guaranteed by the constitution to all other kinds of property and its owners. * * *
>
> *It is perhaps the first instance where a constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions.* * * * *
>
> *The State of California has decreed that in all matters touching public utilities the voice of the legislature shall be the supreme law of the land.* * * * *
>
> Therefore, the following conclusions appear to be irresistible: *That when the constitution itself, as here, declares that a legislative enactment touching a given subject shall not be controlled by any provisions of the written constitution, such a legislative enactment addressed to that subject ex proprio vigore carries with it all the force of an act of parliament.* (pp. 658-9)
>
> (Italics ours.)

The Supreme Court of the State of California definitely decided in that case, that except in so far

as the Federal Constitution may be involved and except in determining whether the Commission has acted within its jurisdiction, the Supreme Court of the State of California, and all other Courts of the State, are divested of all jurisdiction to review the orders or decisions of the Railroad Commission of the State of California.

The complaint of defendant in error is not based upon any provision of the Federal Constitution. No claim is made that any right founded upon the Federal Constitution has been impaired and no such cause of action was pleaded in the complaint. Therefore the appellate court may not consider any such question on appeal.

Cox vs. Texas, 202 *U. S.* 446;
Chesapeake & Ohio R. Co. vs. McDonald, 214 *U. S.* 191;
Southwestern Oil Co. vs. Texas, 217 *U. S.* 114, 118.

The jurisdiction of the Federal Courts was invoked solely upon the diversity of citizenship of the parties.

The complaint is predicated exclusively upon the constitution and statutory law of the State, and the rights of defendant in error must be determined under the law of the State of California as found in its constitution and statutes, as they have been construed and determined by the Railroad Commission of the State of California, the "court" of last resort.

In deciding the *Telephone Case, supra,* the Supreme Court of the State of California did no more than determine whether violence had been done to the provisions of the Federal Constitution. The Court concludes:

> "1—The constitution has, in the railroad commission created both a court and an administrative tribunal.
>
> 2—The constitution has authorized the legislature to confer additional and different powers upon this commission touching public utilities unrestrained by other constitutional provisions.
>
> 3—The legality of such powers as the legislature has or may thus confer upon the commission, if cognate and germane to the subject of public utilities, may not be questioned under the state constitution.
>
> 4—That therefore the deprivation of jurisdiction of the courts of the state may not be questioned.
>
> 5—That therefore the reasonableness of the railroad commission's orders and decrees may not be inquired into by any court of this state and consequently is of federal cognizance only." (p. 689.)

Mr. Justice Sloss, in his concurring opinion, holds that:

> "If the legislature has plenary power to confer powers upon the railroad commission, it may declare that the orders of the railroad commission shall be final and conclusive and not subject to review by any court of this State." (pp. 691-2.)

In deciding the case of *Oro Electric Corporation vs. Railroad Commission of the State of California*, 169 Cal., 466, 471, the Court held:

> "The validity of section 67 of the Public Utilities Act, in so far as it limits the scope of review by state courts of the acts of the commission, must be regarded as finally settled by the telephone company case. By that section, *the findings and conclusion of the commission on questions of fact are made final and not subject to review.*" (Italics ours)

UNDER THE DECISIONS OF THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, CONSTRUING THE CONSTITUTION, THE RATES AND PRACTICES COMPLAINED OF ARE LAWFUL, AND THERE CAN BE NO RECOVERY IN CASES SUCH AS THIS.

CAUSES OF ACTION ARISING SUBSEQUENT TO OCTOBER 10, 1911.

The Commission has definitely and finally decided:

(a) That the plaintiff in error regularly filed applications, sufficient in form and substance, for relief from the provisions of the Long and Short Haul Clause of the Constitution, as amended October 10, 1911.

(b) That the Commission has held an investigation, as contemplated by the Constitution, to determine whether plaintiff in error should be relieved from the operation of said Long and Short Haul Clause.

(c) That the Railroad Commission of the State of California has authorized the carriers to deviate from the said Long and Short Haul Clause.

ORDERS ENTERED BY THE COMMISSION.

The record in the case at bar discloses that on October 26, 1911, the Commission entered an order requiring all carriers "to present to this Commission on or before the 2nd day of January, 1912, for examination and investigation by this Commission, a new schedule or schedules removing said deviations from the provisions of said section of the Constitution of this State, or in case it is desired to justify the same, or any of them, an application or applications to be relieved from the provisions of said section", prescribing the form. (Tr. p. 401.)

A second order was issued by the Commission, under date of November 20, 1911, authorizing the carriers to file such schedules with the Commission on or before January 2, 1912, and to continue existing rates in effect. (Tr. p. 404.)

Thereafter, upon the 30th day of December, 1911, the Southern Pacific Company filed applications pursuant to the orders of the Commission. (Tr. pp. 407-422.)

A hearing was had by the Commission to investigate the applications on the 2nd day of January, 1912. (Tr. pp. 423-4.)

Thereafter, to-wit, on the 16th day of January, 1912, the Commission extended the time to February

15, 1912, within which carriers might file such applications, and decided that if such schedules were not filed within the time specified, the Long and Short Haul Clause of the Constitution would become operative, expressly holding that if applications were filed as ordered the operation of the Long and Short Haul Clause would be suspended. (Tr. p. 425.)

LITIGATED CASES ADJUDICATED BY THE COMMISSION RELATING TO TRAFFIC MOVING SUBSEQUENT TO OCTOBER 10, 1911.

The Commission has definitely and finally construed these orders and determined the scope and effect of proceedings thereunder.

In the case of *Scott, Magner & Miller, et al, vs. Western Pacific Railway Co.*, 2 California Railroad Commission Reports, 626, 635, it was held:

> "Acting under the authority granted by section 21 of Article XII of the constitution as amended, the Commission heretofore, on February 15, 1912, issued its order in Case No. 214, authorizing the carriers of the State to continue their deviations from the long and short haul clause until the Commission could determine definitely the instance, if any, in which it will permit deviations to continue to be made. *While the Commission's order authorizing the temporary continuance of the deviations remains in effect, no cause of action can arise from alleged violations of the long and short haul provision of the Constitution.*' (Italics ours)

Again, in the case of *Phoenix Milling Co. vs. Southern Pacific Company*, 7 *C. R. C.*, 677, 682, the Commission held:

> "The Commission's order of October 26, 1911, in the long and short haul proceeding (Case 214) issued under authority of section 21, Article XII of the Constitution as amended on October 10, 1911, and in pursuance to which the defendant's application was filed, directed the carriers to remove all violations of the long and short haul provisions then existing or in the event it was desired to justify the same or any of such violations, to file applications specifying the particular violations they desired to continue. By this order the carriers were impliedly granted permission, for practical reasons, to maintain the *status quo* until the Commission passed upon such applications. By a subsequent order issued on November 20, 1912, in the same proceeding, *express permission so to do was given.*

In the case of *Fresno Traffic Association vs. Southern Pacific Company, et al*, 8 *C. R. C.*, 390, involving precisely the same questions as were submitted to the Court in the case at bar, and shipments moving between identically the same points, the Commission held that:

> "The *sole question*, therefore, to be decided in this proceeding is whether the carriers violated the provisions of the long and short clause of the Constitution and Public Utilities Act in assessing and collecting higher rates on said shipments between San Francisco and Fresno

than the carriers collected on similar shipments between San Francisco and Los Angeles, or whether any action taken by the Railroad Commission of the State of California, hereinafter designated as the Commission, relieved the defendant carriers from the obligation of observing the long and short haul provisions on said shipments."

The Commission recites that on October 26, 1911, the carriers were notified to file with the Commission all rates not in conformity with the Long and Short Haul clause, and to designate wherein the carriers desired to deviate from the provisions of the Long and Short Haul Clause. It was decided that:

> "On February 15, 1912, the Commission issued an order authorizing the carriers to continue deviations from the long and short haul clause until the petitions had been finally passed upon by the Commission.

The significant and conclusive finding was made by the Commission that:

> "Previous to said order of February 15, 1912, an extended investigation was made by the Rate Department of the Commission, under the Commission's instructions and supervision, with reference to the deviations from the long and short haul clause, on the part of the carriers, including the defendants herein, as shown by said petitions.
>
> The evidence in this proceeding shows clearly that the investigations thus conducted by the

Rate Department were extended and exhaustive, and that frequent conferences on this subject were held, as the investigation proceeded, between the Commission and its Rate Department, prior to the order of February 15, 1912. This investigation, as shown by the evidence herein, covered not merely the general subject, but also was specifically directed to the individual deviations shown in the petitions of the carriers. The order of February 15, 1912, was based upon these investigations.

Complainant's claims in this proceeding are accordingly without merit.

As this Commission has, after investigation, authorized the carriers, pending the further order of the Commission, to continue the deviations from the long and short haul clause herein involved, and as the question of the violation of the long and short haul clause is the sole basis for the claim of reparation herein, the complaint should be dismissed."

On the 19th of June, 1916, the Commission entered its final orders in re *The Matter of the Application of Southern Pacific Company*, etc., for relief from the Long and Short Haul provisions of Section 21, Article XII, of the Constitution of California, and Section 24 (a) of the Public Utilities Act, relating to Class Rates, *Decision No.* 3436, *Case No.* 214-A, (not yet reported); and in re *Application of Southern Pacific Company* for relief from Long and Short Haul provisions of Section 21, Article XII, of the Constitution of California, and Section 24-(a) of the Public Utilities Act, relating to Inter-

mediate Commodity Rates, *Decision No.* 3440, *Case No.* 214-*E*, (not yet reported,) wherein it was recited that the applications were regularly filed. The Commission held that:

> "Discrimination is a *question of fact*, and whether it be undue and illegal is also a *question of fact* and the Constitution and the Public Utilities Act (Sec. 24-a) have imposed upon this *Commission* the duty of determining these *questions of facts. Acting within its authority, the ruling of this Commission in this regard is conclusive.* (Public Utilities Act, Sec. 67.)" (Italics ours)

The Commission finds, and they are the sole judges of the fact, that:

> "A number of hearings were held in San Francisco, and the carriers and the shipping public given full opportunity to present their views in connection with the rates. *As a result of the hearings and investigations the Commission issued an order February* 15, 1912, authorizing the carriers to continue in effect rates in violation of the Constitution until such time as the Commission reached a final conclusion in each individual case."

The orders, predicated upon the findings of fact made by the Commission, are as follows:

> "*It is hereby ordered* that the Southern Pacific Company and its connections, such connections arising from membership in the Pacific Freight Tariff Bureau, be and they are hereby authorized to continue class rates as set forth

in the applications and exhibits referred to in said opinion and maintain higher rates at intermediate points, except that the discrimination in rates to and from South Vallejo and Napa, referred to in Exhibits Nos. 1 and 2, be removed and applications covered by Exhibit No. 4 be denied; provided that this authorization shall not be construed to pass on the reasonableness of the intermediate rates or any other matter except the application of the long and short haul clause of the State Constitution and the Public Utilities Act." (Case 214-A).

"*It is hereby ordered* that the Southern Pacific Company and its connections, such connections arising from membership in the Pacific Freight Tariff Bureau, be and they are hereby authorized to continue commodity rates as set forth in the applications and exhibits referred to in said opinion and maintain higher rates at intermediate points, provided that this authorization shall not be construed to pass on the reasonableness of the intermediate rates or any other matter, except the application of the long and short haul clause of the State Constitution and the Public Utilities Act." (Case 214-E).

It thus conclusively appears that plaintiff in error filed with the Commission, in accordance with the rules promulgated by the Commission, applications to be relieved from the operation of the Long and Short Haul Clause of the Constitution; and that the Commission entered upon an investigation of the rates involved, and *after investigation* entered an order expressly authorizing the carriers to deviate from the Long and Short Haul Clause of the Constitution and Statute.

These decisions of the Commission are final, and no appeal lies therefrom.

Pacific Tel. & Tel. Co. vs. Eshelman, 166 *Cal.*, 640.

Intermountain Cases, 234 *U. S.*, 476

In deciding these questions it was necessary for the Commission to determine the *questions of fact* and as the court held in the case of *Oro Electric Corporation vs. Railroad Commission, supra*

> *"The findings and conclusions of the Commission on questions of fact are made final and not subject to review.*

The trial court overruled plaintiff's demurrer to defendant's special defense Number Seven, pleaded in the answer, and recognized that if the allegations were supported by evidence that the defendant was entitled to judgment. The record disclosed conclusively that the Commission, after investigation, and after petitions had been filed by defendant, authorized defendant to charge more for the shorter distance to the intermediate points between San Francisco and Los Angeles than for the longer distance in the same direction, and as this evidence was not controverted, defendant was entitled to a judgment. In this respect the evidence wholly failed to sustain the court's finding that:

> "Nor is it true, that, as alleged in defendant's seventh further and separate defense contained in its answer, that as to each and all or any of the shipments referred to in plaintiff's separately stated causes of action, which

> moved or were delivered after October 10, 1911, the Railroad Commission of the State of California, pursuant to Section 21, Article XII of the Constitution of the State of California, as amended October 10, 1911, or otherwise, authorized defendant, after investigation, or at all, to charge more for the shorter distance to the point between San Francisco and Los Angeles to which such shipment was transported, than for the longer distance in the same direction." (Tr. p. 359)

The Commission has repeatedly and consistently held in the decisions to which we have referred that applications sufficient in form and substance were filed, and that, after investigation, it authorized the deviation from the long and short haul provisions of the Constitution, and that being a finding of fact, is not open to review in this action.

CAUSES OF ACTION ARISING PRIOR TO OCTOBER 10, 1911.

The Railroad Commission of the State of California has rendered decisions which are final and from which no appeal can be prosecuted, deciding that there can be no recovery under the provisions of Section 21 of Article XII of the Constitution of 1879, on shipments moving under rates which had been "established and published" by the Commission under the provisions of Section 22 of the same article and the record in the case at bar shows that the Commission has approved the tariffs relating to the traffic involved in this controversy.

The record in the case at bar discloses, with reference to shipments moving prior to October 10, 1911, that upon June 11, 1909, the Railroad Commission of the State of California unanimously adopted a resolution reciting that the plaintiff in error, among other carriers, had filed with the Commission a copy of the schedules showing rates for the transportation of freight and passengers between points within the State of California, and "that the aforesaid schedules be and the same are hereby received and filed with this Commission as the rates, fares and charges, * * * * which have been made and filed by the said carriers respectively, pursuant to the provisions of Section 18, of the Act of the Legislature of this State, approved March 20, 1909; and that the said rates, fares and charges *shall* be published by said carriers respectively as required by said Act, and *shall be the lawful rates*, fares and charges of said carriers respectively, subject to be changed as in said section provided, or by this Commission pursuant to the provisions of Section 19 of the aforesaid Act." (Trans. p. 447). This resolution embraces the rates complained of in this proceeding.

So far as the rates involved in this controversy are concerned, a formal proceeding was instituted before the Commission, complaining of the inherent and relative reasonableness of the rates charged by the Southern Pacific Company, and the Commission, after an exhaustive investigation, on December 24, 1910, ordered the carriers to make an adjustment

of the rates between San Francisco, Stockton, Los Angeles and San Joaquin Valley points, the order to become effective February 15, 1911.

Thereafter, a rehearing was requested by certain parties to the original proceeding, and upon March 28, 1912, the Commission entered an order, again prescribing the relation of terminal and intermediate rates between those points, which applied precisely to the same territory as is involved in the case at bar, specifically prescribing the rates to be established "as just and reasonable rates to be observed by the Southern Pacific Company * * * * *". (Tr. p. 428.)

Traffic Bureau of the Merchants Exchange vs. S. P. Co., et al, 1 C. R. C., 95.

The Commission held:

> "In order that there may be no misapprehension on the part of the carriers involved as to the scope of this decision, we have, as already indicated, prescribed the actual rates to be charged between all points involved, and as to such rates there can be no confusion." (p. 96.)

The Commission directed the carriers' attention to the provisions of Section 21 of Article XII of the Constitution, and admonished the carriers not to violate this provision of the Constitution, except in the particulars permitted by the Commission.

It thus appears that the Commission, by formal orders, and in one instance, in a contested proceeding brought before them, definitely and finally

prescribed the charges that should be made for transporting freight between the points involved in the controversy; and that in the case of the Traffic Bureau of the Merchants Exchange, supra, the Commission "prescribed the actual rates to be charged between all points involved * * * *", and expressly recognized that in so doing the carriers were permitted to deviate from the provisions of the Long and Short Haul Clause of the Constitution.

Traffic Bureau of the Merchants Exchange vs. S. P. Co., et al, supra, p. 97.

It therefore conclusively appears that as to all rates here involved covering movements prior to Oct. 10, 1911, the Commission had judicially fixed their status.

LITIGATED CASES ADJUDICATED BY THE COMMISSION RELATING TO TRAFFIC MOVING PRIOR TO OCTOBER 10, 1911.

The Commission has definitely and finally decided that under the provisions of Section 21 of Article XII of the Constitution of October 10, 1911, the carriers might be permitted to deviate from the Long and Short Haul Clause of the Constitution, where the Commission had approved, and especially where it prescribed, the rates to be charged by the carriers pursuant to the provisions of Section 22 of Article XII.

In deciding the case of *Scott, Magner & Miller, et al, vs. Western Pacific Railway Co.*, 2 C. R. C., 626, supra, the Commission held:

"The framers of the constitution of 1879, however, provided in Section 22 of Article XII

that the rates should be established and published by the Railroad Commission and not by the carriers, and that the rates so established and published should be deemed in all proceedings, both civil and criminal, to be conclusively just and reasonable. It could hardly be held that a shipper could recover from a carrier for charging a conclusively just and reasonable rate—a rate, moreover, which the carrier was compelled, under heavy penalties, to charge. If the shipper were dissatisfied, he could apply to the Railroad Commission to alter the rate, but it would certainly be entirely at variance with such a system of state-made rates to hold that the Commission, in addition to making an order as to the just and reasonable rates to be thereafter charged, should also compel the carrier to pay remuneration for having charged the rate which the Railroad Commission compelled it to charge, and which, under the Constitution, became a conclusively just and reasonable rate. We are accordingly of the opinion that if the Railroad Commission had established the defendant's rates, as it was its duty under the Constitution to do, no right to reparation could have arisen, on the theory of unjust or unreasonable rates on the facts stated in this complaint prior to October 10, 1911. The shipper's remedy would be to petition the Commission to alter the rate and then to sue the carrier if he failed to conform to the rate so established. The United States Supreme Court, in the cases of *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S., 426; and *Robinson vs. Baltimore & Ohio R. R.*

Co., 226 U. S., 506, has expressed its views with reference to the relation between the Interstate Commerce Commission and the Courts in entire harmony with the views herein expressed as to the effect which the establishment of a system of state-made rates had on the common law right to sue for damages by reason of the collection of an unjust and unreasonable rate."

In a later decision, *Scott, Magner and Miller vs. S. P. Co.*, 3 C. R. C., 339, the Commission says (p. 340):

"Reparation is requested in this case upon an alleged violation of the long and short haul clause contained in Section 21 of Article XII of the Constitution of this State prior to its amendment on October 10, 1911, and under the long and short haul provisions of the Wright Act. This commission's decision in case No. 283 (being the case last above quoted from), to which reference has already been made, gives a complete analysis of the effect of the long and short haul clause in the constitution and in the Wright Act. It was there decided that the long and short haul clause in the constitution when construed together with other provisions in the constitution announcing that the rates established by this commission should be 'deemed conclusively just and reasonable', must be regarded binding upon the carriers only until such time as the commission in any particular instance actually establishes the rates. The records of this commission show that on June 11, 1909, the commission

> established the rates to be charged by defendant for carrying hay between the points involved in this proceeding. These rates thereupon became 'conclusively just and reasonable', and the provisions of the long and short haul clause in the constitution and in the Wright Act could not be made the basis of a claim for reparation upon the charges which were collected in conformity with these rates."

This ruling is confirmed by, and amplified in, the well-considered opinion of *Pennoyer vs. S. P. Co.*, 3 C. R. C., 576.

These decisions of the Commission, as we have heretofore shown, are final and not subject to review; they are the decisions of a "Court of last resort", construing the State law; and, as we shall hereafter show, they are binding upon this Court, and should have controlled its decision.

It is respectfully submitted that the construction placed upon the constitutional and statutory provisions by this Court should therefore be modified to conform to the construction which has been placed upon the law by the Railroad Commission of the State of California.

At page 17 of its typed decision, this Court makes a distinction between the powers which may be exercised by the Railroad Commission of the State of California and the Interstate Commerce Commission. When Section 4 of the Interstate Commerce Act was amended, it is true that an express provision

was made enlarging the powers of the Commission so that temporary relief might be granted to the carriers pending the determination of their applications for relief. But it does not necessarily follow that the legislative intent to permit the Railroad Commission of the State of California to afford such temporary relief could only have been expressed by incorporating a similar provision in the State Constitution and Statute.

The case of *L. & N. R. Co. vs. Kentucky*, 183 U. S., 503, 507-8, is directly in point. This case went to the Supreme Court of the United States upon a writ of error, to review the judgment of conviction of the railroad company on an indictment for an alleged violation of a statute practically identical in terms with the Long and Short Haul Clause of the California Constitution and provisions of the Public Utilities Act. In passing upon the question as to whether the decision of the Court of Appeals of Kentucky, construing this section, controlled the decision of the Supreme Court of the United States, it was held:

> "It was contended, in the Courts below and here that as section 218 of the constitution of the State of Kentucky regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the interstate commerce act, it should be assumed that it was the intention of the constitutional convention of Kentucky to adopt the construction put upon that provision of the

interstate commerce law by the Federal courts, and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions, entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation or coal from points outside of the state.

Such contention might seem reasonably to have been urged in the state courts, but as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the state enactments to be that found in them by the state Courts." (Italics ours)

In the decisions of the Commission which we have cited, the Commission has construed the constitutional and statutory provisions as empowering it to permit the carriers to deviate from the provisions of the Constitution by approving the specific rates which should be charged by carriers between long and short haul points, so far as the Constitution of 1879 is involved, and as empowering them to afford the carriers temporary relief pending the final determination of the issues involved in applications for relief under the amendment of 1911.

The Commission also holds that the rates effective October 10, 1911, remained in *statu quo* "until changed by the Commission."

Under the Commission's construction of the constitutional provisions, prior to the amendment of October 10, 1911, rates established by the Commission, although they might infract the provisions of Section 21 of Article XII, were lawful rates; and the Commission held that the provisions of Sections 21 and 22 should be read in *pari materia*, and that therefore there could be no violation in cases where the rates involved had been approved by the Commission. "Otherwise, the defendant would have been compelled to pay damages if it charged the rates established by the commission and also a fine up to $20,000 for each offense if it failed to charge those rates. It would be compelled to pay both if it obeyed and if it disobeyed the railroad commission's order."

The amendment to the Constitution of October 10, 1911, as was held by His Honor, Judge Ross, in his dissenting opinion, provided that the Eshelman Act of February 10, 1911, should be construed valid in all its parts by the constitutional amendment itself, and that it "shall have the same force and effect as if the same had been passed after the adoption" of the constitutional amendment, from which, His Honor Judge Ross reaches the conclusion that all action which had been taken by the Railroad Commission and all rates adopted by the com-

mission and recognized by the Commission as just rates under the Eshelman Act are recognized as valid and continued in force until changed by the Commission.

Thereby the people definitely willed that the action which had been theretofore taken by the Railroad Commission of the State of California, and the orders which had been entered by said Commission relating to rates should be continued in effect. It therefore logically follows that rates in effect on October 10, 1911, and which had been approved by the Commission, and all tariffs which had been filed with and accepted by the Commission, which required an affirmative act on the part of the Commission, were the lawful rates to be charged, and therefore could not be held to violate any provision of the amended constitution.

That these tariffs were filed with and adopted by the Commission we offered to prove herein. Leave was denied.

It is apparent from a reading of the Commission's orders, which were rendered subsequent to the adoption of the amendment of 1911, that they construed the law to mean that the rates remained and necessarily should remain in *statu quo* and pending final determination of the questions arising under the Long and Short Haul provisions of the Constitution and Statute, recognized the right of the carriers to charge the rates which were in effect upon the date of the adoption of the constitutional amendment.

The Commission therefore was vested with power to enter their temporary orders continuing the rates previously established by them in effect as lawful rates, notwithstanding that there were to be deviations from the provisions of the Long and Short Haul Clause until such time as the Commission had an opportunity of *fully* investigating the applications which had been filed by the carriers. It is apparent, from the legislative intent expressed in the Constitution and the statutory provisions of the California law, that it has been the consistent policy of the State of California from the beginning to permit deviations from the provisions of the Long and Short Haul Clause of the Constitution, as originally enacted and as finally amended, whenever in the opinion of the tribunal which has been erected to determine such questions it was believed that no undue discrimination would result therefrom.

The power of the Commission to relieve carriers from the provisions of the Constitutional inhibitions found in the Constitution of 1879 was accomplished by "establishing and publishing" the rates filed by the carriers, and when the Commission had placed its stamp of approval upon the rates, the carriers were to that extent relieved; and the rate schedules which had been "established and published" by the Commission authorized the carriers to depart from the provisions of the constitutional prohibitions by charging less for the longer than for the shorter distances.

That no departure from this public policy was intended by the enactment of the constitutional amendment of 1911, is apparent. All that was sought to be accomplished was to enlarge the powers of the Commission in the light of the restrictive rate legislation which had been enacted by the Federal and State Governments since the adoption of the original Constitution, and to provide a more comprehensive and expeditious method of determining such questions and of enforcing the law. Therefore, the people and the Legislature, in enacting the constitutional and statutory amendments to the existing law, deemed it unnecessary to expressly confer upon the Commission, as the Congress conferred upon the Interstate Commerce Commission, power to relieve the carriers temporarily from the provisions of the Long and Short Haul Clause of the Constitution, principally, as has been shown, because the Commission had accomplished that purpose in the past by "establishing and publishing" of the rates under the authority vested in them by Section 22 of Article XII, and these rates were continued in effect by the express provisions of the Constitutional amendment of 1911.

The last paragraph of amended Section 22 of Article XII provides:

> "The 'Railroad Commission Act' of this State, approved February 10, 1911, shall be construed with reference to this constitutional provision, and any other constitutional provision becoming operative concurrently herewith, *and the said act shall have the same force*

*and effect as if the same had been passed after the adoption of this provision of the constitution and of all other provisions adopted concurrently herewith * * *"*

(Italic ours.)

The Commission's orders and decisions to which reference has been made disclose that the Commission in the exercise of the power originally conferred under Section 22 of Article XII of the Constitution of 1879, and subsequently by virtue of the power conferred by the provisions of Section 17 of the Eshleman Act, adopted February 19, 1911, had actually established rates to be charged by the carriers between all points involved in this proceeding.

That this power is sufficiently broad to enable the Commission to have entered these orders is shown by the express provisions of Section 17 of the Eshleman Act.

> "It is hereby made the duty of the commission within a reasonable time not exceeding sixty days after the filing of the schedules or tariffs and classifications and proposed changes therein of any such railroad or other transportation company to establish such of the rates and classifications included therein, as it may approve and as to those not so established to proceed with the establishment of others in lieu thereof after notice and opportunity for hearing given such company as provided in section sixteen of this act; *provided, however*, that until the establishment of such rates and classifications or

> the establishment of other in lieu thereof the said railroad or other transportation company filing such schedules or tariffs and classifications, and parties thereto, shall charge and collect the rates and fares in effect at the time of the passage of this act, and that with said exception no railroad or other transportation company subject to the provisions of this act shall engage or participate in the transportation of freight or passengers except at rates of charges and classifications which have been established for it by the commission."

The conclusion is irresistible that it was intended that the Commission could and should exert this power of granting relief, so as not to compel a situation which would result in a temporary adjustment, disarranging all previous adjustments, and bringing about commercial chaos.

THE DECISIONS OF THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA ARE THE DECISIONS OF A COURT OF LAST RESORT AND ARE BINDING UPON THE FEDERAL COURTS.

We have already shown that the Railroad Commission of the State of California has been constituted a "court," and that its "decisions upon * * * * controverted matters are strictly judicial".

Pacific Telepone & Telegraph Co. v. Eshleman, Supra.

It has been held that the construction by the highest court of a state of a state statute, defining the powers of the state Railroad Commission, is binding upon the Federal Courts in determining the powers of the Commission.

Louisville & Nashville RR Co. v. Kentucky Railroad Commission, 214 *Fed.* 465.

The decisions of the courts, Federal and State, are practically unanimous in holding that the decisions of such a tribunal construing the constitutions and statutory laws of a state are binding upon the Federal Courts.

The latest announcement of this rule by the Supreme Court is found in the case of *Northern Pacific Railway v. Meese*, 239 U. S. 614, 619.

As early as the case of *Carroll v. Safford*, 3 *Howard*, 441-460, the Supreme Court held:

> "The practical construction of local laws is perhaps the best evidence of the intention of the law makers. The courts of the United States adopt as a rule of decision the established construction of local laws, and it cannot be material whether such construction has been established by long usage or a judicial decision."
>
> *Gilman v. City of Sheboyan*, 2 *Black*, 518.

It has also been held that a decision by the highest court of a state, placing a limitation upon the scope of a state statute, whether based upon a construction of its language *or considerations of public policy*, is in either case an interpretation of the

statute which must be followed by the Federal Court.

Zeigler v. Pennsylvania R. Co., 158 Fed. 809.

Where the highest court of a state, in this case the Supreme Court of the State of California, has decided that the decision of another court of the State, in this instance the Railroad Commission of the State of California, is final, the Supreme Court of the United States has held that a writ of error will lie direct to the Supreme Court of the United States from the court in which the decision is made final.

Missouri, Kansas & Texas Railway Co. v. Elliott, 184 *U. S.* 530.

The Supreme Court of the United States has gone so far as to hold that—

> "Even if no statute or decision of the Supreme Court of the State is produced, the probability is that the local procedure follows the traditions of the place, and courts of other jurisdictions owe great deference to what the court concerned with the case has done."

It is held in this case—

> "It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws.

Michigan Trust Company vs. Ferry, 228 *U. S.* 346, 354.

The local option statutes of the State of Texas being enforced through criminal proceedings, in de-

termining the validity and construction of such statutes the court of criminal appeals of the state of Texas is the court of last resort, the Federal Courts are bound to follow the construction placed upon such statutes by that court.

Love vs. Busch. 142 *Fed.* 432.

The authorities are uniform in holding that a single adjudication by the court of last resort of a state is *binding* upon the Federal Courts, and that it does not require a series of such adjudications by the court of last resort to bind the Federal Courts.

Adams Express Company v. Ohio, 165 *U. S.* 219;

Kibbe vs. Ditto, et al., 93 *U. S.* 674-680.

Williams vs. Eggleston, 170 *U. S.* 311;

Louisville, etc. Ry. Co. v. Mississippi, 133 *U. S.* 589-90.

This well established rule has been applied to subordinate tribunals empowered to exercise quasi judicial power. The decisions of a board constituted to try election contests, which it had the power to decide, its decisions being considered a judgment in litigated matters pending before it, was held to be a court by whatever name it was called.

Moss etc. v. Rowlett, etc. 112 *Ky.* 123.

Federal Courts are bound by the decisions of a commission appointed to relieve the business of the Supreme Court of a state when there has been no adverse decision rendered by the Supreme Court.

It was held by the Circuit Court of Appeals of the Second Circuit that

> "The Commission of Appeals was a temporary court of last resort created to assist the Court of Appeals in disposing of an overcrowded calendar"

and that while there were two co-ordinate courts of last resort sitting in the same state at the same time and deciding questions of the construction of state statutes in diametrically opposite ways, the Federal Court might

> "with greater propriety confirm its decision to that of the permanent, rather than to that of the temporary, state court, unless some later decision should be found, casting doubt upon the authority of the permanent court."
>
> *Montgomery v. McDermott*, 103 *Fed.* 801, 809.

There is no conflict in the decisions of the courts in this state relating to the questions under consideration; and this case is cited merely to emphasize the fact that subordinate judicial tribunals, the decisions of which are final, may render decisions controlling upon Federal Courts, even though their decisions may be opposite to the decision of a permanent court of last resort.

It has been decided by the Supreme Court of the United States that where a commission was appointed under a constitutional amendment to dispose of such part of the business on the docket of the Supreme Court as should by arrangement between the commission and court be transferred to the commission, that

> "A decision of the commission upon a question properly presented to it in a judicial proceeding is, therefore, entitled to the like consideration and weight as a decision upon the same question by the court itself, and is equally authoritative.'
>
> *Ankeny v. Hannon*, 147 *U. S.* 118-126.

The Railroad Commission of the State of California is a "court", empowered to exercise functions which are "highly judicial" and it is charged with the administration of the law relating to the regulation of public utilities. It has been constituted an expert tribunal to determine controversies arising under this law and its decisions should be given controlling weight, even though a different construction had been placed upon the law by any other tribunal which might have jurisdiction of any such controversies. No other construction has, however, ever been placed upon the California Constitution or statutes by any other "court" of this State, and the power to determine these questions has been vested exclusively in the commission.

If any possible doubt exists as to the meaning of the constitution or the statute, great weight should be given to the construction placed upon it by the department charged with its execution, and the decisions of such department, as was said by the Supreme Court of the *United States, I. C. C. vs. Illinois Central Railroad Company*, 215 *U. S.* 452, should have

"Ascribed to them the consideration due to the judgments of a tribunal appointed by law and informed by experience."

"When the meaning of a statute is doubtful, a *practical construction by those for whom the the law was enacted,* or by public officers whose duty it was to enforce it, acquiesced in by all for a long period of time, in the language of Mr. Justice Nelson, 'is entitled to great if not controlling influence.' (Chicago v. Sheldon, 9 Wall 50, 54.) In People ex rel. Williams v. Dayton, (55 N. Y. 367) the practical construction of a doubtful statute by the legislative and executive departments, continued for many years, was held to have 'controlling weight in its interpretation.' "

City of New York v. New York City Ry. Co., 193 *N. Y.* 549.

"The construction given to a statute by the officers appointed to execute it and acted upon by them for a long term of years, though not conclusive, is entitled to great consideration, by the Court. Union Ins. Co. vs. Hoge, 21 How. 35-66; Edwards, Lessee vs. Darby, 12 Wheaton 210."

Gear vs. Grosvenor, 10 *Federal Cases No.* 5291.

"It is a familiar doctrine that the *construction given to a statute by officials charged with its administration will be upheld* by the courts unless convincing reason to the contrary is found in the language or purpose of the enactment. *New Haven R. R. Co. v. Interstate*

Commerce Commission, 200 *U. S.* 361, 401, 26 *Sup. Ct.* 272, 50 *L. Ed.* 515."

Illinois Surety Co. vs. United States, 215 *Fed.* 338.

"A construction of the law by the *officers charged with its administration* and acquiesced in by all of the departments of the government for a long period should be accepted by the courts, citing 98 *U. S.* 334, 180 *U. S.* 139."

Taggart vs. Great Northern Ry. Co., 208 *Fed.* 460.

United States vs. Cerecedo Hermanos Y. Compania, 209 *U. S.* 337, 339;

Robertson v. Downing, 127 *U. S.* 607;

U. S. v. Healey, 16 *U. S.* 136;

Komada & Co. v. United States, 215 *U. S.* 392, 396;

La Roque v. United States, 239 *U. S.* 62;

United States v. Hammers, 221 *U. S.* 220;

State of Louisiana v. Garfield, etc., 211 U. S. 70;

United States v. Bellm, 182 *Fed.* 161;

United States v. S. Twitchell Co., 184 *Fed.* 252.

It is respectfully submitted that this court in rendering its decision should under these authorities have followed the construction placed upon the Constitution and the statutory law of the State by the Railroad Commission of the State of California, especially as this Commission is not only a body of experts charged with the administration, construction and enforcement of the state law, but also because a majority of the Commissioners being law-

yers of recognized ability, are therefore well qualified by experience and professional education to construe the law. This court should have adopted the Commission's construction because the authorities hold that the findings of fact and decisions of the Commission are final and are binding upon the Federal Courts.

In the case of *Matz et al v. Chicago & A. R. Co.* 85 *Fed.* 180, the Federal Court in determining whether a statute applied to certain cases, found that the question had never been raised by the judges or counsel engaged in deciding and prosecuting such suits.

Held, that

> "Uniform and contemporaneous action and opinion of the bench and bar of a state should have weight with the Federal Courts in construing a statute of the state."
>
> "The practical construction given to a law by the practice of the court and bar since the enactment of the law, and the form adopted for the enforcement of the penalties provided by that law, are not to be overturned but on the clearest proof that that construction is erroneous and the method of procedure defective."
>
> *United States v. Ballard*, 24 *Federal Cases No.* 14506.

The Supreme Court of the United States has held that custom or usage may be looked to in order to determine the proper determination of a statute.

> *Berbecker v. Robertson*, 152 *U. S.* 373, 376.

Never since the adoption of the Constitution in 1879 until the cases recently decided by the California Railroad Commission have the questions involved in this suit been raised, but the bench and the bar, carriers and shippers alike, have regarded the law as settled as compelling carriers to charge rates adopted, approved and prescribed by the Commission, under the powers vested in it by the Constitution, irrespective of the question whether under such rates so established the carriers charged more for the shorter than for the longer haul, over the same line, in the same direction, and the Commission has consistently held that the carriers have been relieved by its orders approving and establishing rates in deviating from the provisions of the Constitution as originally enacted and as finally amended.

A review of the Public Utilities Act of the State of California, read in conjunction with the comprehensive constitutional amendments which were contemporaneously adopted, discloses a well expressed legislative intent to provide a comprehensive system of regulating railroads, vesting "powers of a highly judicial nature" in a body of experts, and constituting the Commission a "court", with a jurisdiction intended to extend throughout the State, and vesting the Commission with the greatest possible power and jurisdiction to supervise and regulate railroads operating within the State, and confiding to the Commission such powers as are necessary and convenient to regulate such railroads

and determine controverted questions such are raised in this proceeding.

The statute is remedial and should receive a liberal construction, in order that its broad purpose may be effectuated. The State of California, while following the lead of the Federal and other state governments, has nevertheless, in its desire to provide for an ample and thoroughly effective scheme of regulation gone further than its predecessors and by constitutional enactment has authorized the legislature to—

> "confer upon the Commission such powers as it may see fit, even to the destruction of the safe-guards, privileges and immunities guaranteed by the Constitution to all other kinds of property and its owners,"

and in the *Pacific Telephone & Telegraph Company* case it was held that this was

> "perhaps the first instance where the Constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions * * * * "
>
> "It may be said that the final order of the Commission in many instances is legislative and administrative in character, but none the less the ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial."

The Constitution has not only created a Railroad Commission and, under the amendment of 1911 greatly enlarged its power, but has vested the legis-

lature with plenary power, unlimited by any provision of the state Constitution, other than those authorizing the creation of the commission and defining its powers to confer additional power upon the Commission. The Supreme Court of the state has held that to this extent the Legislature has been given the powers of Parliament and is only restricted by the Federal Constitution; and that the power of review, reserved or vested in the Supreme Court of the State, under the construction placed upon the Constitution and statutes by the Court itself, is extremely limited.

The Railroad Commission of the State of California has determined in other formal and controverted proceedings the questions which are involved in the case at bar, and has as a court of last resort, held that the applications made by Southern Pacific Company and the order entered thereon, after investigation by the Commission, have given plaintiff in error a dispensation from the provisions of the long and short haul clause, and under no circumstances can there be a review from the *findings of fact* made by the Commission.

In view of the decision of the Supreme Court of the State of California in the Pacific Telephone & Telegraph Case, holding that the decisions of the Commission cannot be reviewed except upon jurisdictional questions, it must be held that the *findings of fact* and orders made and entered by the Commission are necessarily final upon the construction of the provisions of the Constitution and of the law

passed pursuant thereto, and as there were no jurisdictional questions involved in the proceedings before the Commission which might be reviewed by the Supreme Court of the State, the Commission's decision is that of the highest tribunal in construing the constitutional and statutory law of the State.

The decisions of the Supreme Court of the United States, to which we have referred, render it certain that the decisions of the Commission, as a court of last resort, are binding upon the Federal Courts. The reasons why such a rule applies and governs in the present case are apparent when consideration is given to the fact that there are now pending in the State Courts many suits involving claims of a character similar to that involved in the case at bar, in which suits the State Courts are bound under the decisions of the Supreme Court of the State of California to regard the decisions of the Railroad Commission of the State as final and controlling, and the state courts must therefore necessarily hold therein that there is no right of recovery against the carriers for the reason that the carriers have complied with the law and secured a dispensation from the provisions of the long and short haul clause by an order of the Commission. Yet, merely because a suit happens to be filed in a Federal Court, we have at the present time a rule in force holding that the carriers are liable. The result is that there are two forums enforcing absolutely conflicting decisions, which is precisely the

result which the Supreme Court of the United States intended should never occur.

The plaintiffs in the court below, by invoking the jurisdiction of this court, solely upon the ground of diversity of citizenship, have indirectly sought to accomplish what they could not do directly—to have this court review the orders of the Railroad Commission of the State of California and the judgment entered by the trial court, and the confirmation of that judgment by this court has been to reverse the Commission's decisions not only on questions of law but on *findings of fact.*

It is perhaps due to the court to say that we regret that these questions were not fully presented to the court in the briefs and argument.

The confidence of counsel that this court, in deciding the case, would follow the Commission's construction of the state constitution and laws, undoubtedly led him away from an exposition of the points and authorities now presented; but it is respectfully submitted that the importance of this controlling question justifies the court in giving full consideration to the points and authorities now presented, and that a rehearing of this case be granted.

Respectfully submitted,

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We hereby certify that in our judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

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